FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 6 1960
JAMES R. BROWNING, Clerk

No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION 450, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and W. S. CHENNAULT, its Business Representative

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RUSSELL SPECTER,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings	3
1. The discriminatory hiring arrangement	3
2. The discrimination against J. R. Rittenberry	4
B. The Board's conclusions and order	6
C. The decision of the Court of Appeals	7
Reasons for granting the writ	7
Conclusion	8
Appendix	1a

CITATIONS

Cases:

Local 60, United Brotherhood of Carpenters v. *National Labor Relations Board*, No. 68, this Term, certiorari granted June 27, 1960	7
National Labor Relations Board v. *Local 85, Sheet Metal Workers' International Association*, 274 F. 2d 344, No. 89, this Term	7
National Labor Relations Board v. *Local 357, International Brotherhood of Teamsters*, No. 85, this Term, certiorari granted June 27, 1960	7
National Labor Relations Board v. *Millwrights' Local 2232*, 277 F. 2d 217, No. 229, this Term	7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	
Section 7	6
Section 8(b)(1)(A)	2, 6
Section 8(b)(2)	2, 6
Section 10(c)	2-3

In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION 450, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and W. S. CHENNAULT, its Business Representative

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The National Labor Relations Board prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case on July 12, 1960, which denies enforcement of the reimbursement provisions of the Board's order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, pp. 1a-11a, *infra*) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 138-153)* are reported at 122 NLRB 564.

---

* "R" references are to the Transcript of Record printed in the court below. "B.A." references are to the printed appendix to the Board's brief in that court.

JURISDICTION

The judgment of the Court of Appeals (Appendix, p. 11a, *infra*) was entered on July 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, as a remedy for an arrangement between an employer and a union which unlawfully conditions hiring upon union membership, may require that the employees be reimbursed for all dues and assessments which they paid to the union under that arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *.
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> * * * * * *
>
> Sec. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint

has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

STATEMENT

A. The Board's Findings

1. The discriminatory hiring arrangement

Tellepsen Construction Company is a contractor performing maintenance and repair operations at the Dow Chemical Company plants at Velasco and Freeport, Texas. From July 1954 to April 1958 the Company, as a member of the Houston Chapter of the Associated General Contractors, was a party to contracts negotiated between the Association and Local 450 of the International Union of Operating Engineers. These contracts required the Company to appoint a master mechanic at each job site who was to have "full and complete charge of the men under him" (R. 96; B.A. 76-80). Master mechanics were required to have at least three years' experience at their trade (R. 71-72; B.A. 80). Although the contracts did not so specify, no one could become master mechanic without the Union's approval (R. 71-72; B.A. 31-33, 55-56). The Union refused to clear any employee, regardless of his experience, unless he had been a member of the Union for over three years (R. 138-140; B.A. 52-55). As Union members the master mechanics were bound by their Union's constitution to "hire none but those in good standing with a Union having jurisdiction over the work to be done" (R. 69; B.A. 81).

The Company delegated the exclusive authority to recruit and hire engineers to the master mechanics who hired solely from the Union hiring hall. Thus, whenever employees were needed, the Company's construction superintendent informed the master mechanic on the job of the number and skill classifications required (R. 65-67; B.A. 50-51). The master mechanic relayed this information to his business agent at the hiring hall. The business agent selected qualified persons from an "out-of-work" list maintained solely for union members (R. 68; B.A. 7-8, 18-19, 46-47, 64-65, 71-72). Those selected were given referral slips by the business agent and dispatched to the job site, where, upon presentation of the referral slip, they were placed on the Company payroll (R. 67; B.A. 56-57).

2. The discrimination against J. R. Rittenberry

J. R. Rittenberry had been an operating engineer since 1927. He began working for the Company in March 1953 (R. 48; B.A. 24). In April 1955 Tellepsen's construction superintendent asked the Union's business agent to approve Rittenberry's promotion to master mechanic. The business agent, after first agreeing to do so, later refused to approve Rittenberry on the ground that he had not been a Union member for three years (R. 49, 71; B.A. 51-55). Whereupon the Company sought and obtained Union approval of the appointment of another employee who had been a Union member for many years to serve as master mechanic (R. 50; B.A. 55).

In July 1956, the Union went on strike against all members of the Houston Associated General Contractors (R. 50, 73; B.A. 6-7). Rittenberry, who was on vacation when the strike commenced, never partici-

pated in any picketing activities (R. 50; B.A. 33). When the strike ended in August, the Company notified the Union that all the employees were to report to the Union hiring hall to be dispatched as soon as the equipment could be put back into operation (R. 51; B.A. 8-9). Rittenberry reported to the Union hall the day after the strike ended. The business agent informed Rittenberry that he would have to pay a fine for failing to perform picket duty, and that, rather than being dispatched to his former job, he would be placed at the bottom of the out-of-work list (R. 50-51, 73; B.A. 35-38). Under protest Rittenberry agreed to pay the fine, but he insisted that he had a right to return to his job without going on the out-of-work list. The business agent ruled that even if he paid the fine he had to go to the bottom of the list. Rittenberry refused to submit to this condition and left the Union hall without paying the fine (R. 73; B.A. 38). Thereafter, Rittenberry made several attempts to return to his former employment, but the Union refused to dispatch him or permit the Company to hire him (R. 51-52, 73-74; B.A. 39-40). In early March 1956, Tellepsen's superintendent called the business agent on Rittenberry's behalf, and the business agent agreed to place his name on the out-of-work list (R. 52, 74; B.A. 51-63). On March 20, Rittenberry returned to his job at Tellepsen (*ibid.*)

On September 1, 1955, shortly after the Union refused to permit him to return to work at Tellepsen, Rittenberry filed unfair labor practice charges with the Board (R. 17-20). On May 13, 1956, just two weeks prior to the hearing on those charges, a Union business representative threatened Rittenberry that if he did not withdraw the charges he would lose his

Union "book" and be unable to get work anywhere (R. 79; B.A. 41-42). These threats were repeated on May 24, 1956, by another Union official (R. 79; B.A. 43-45).

B. The Board's Conclusions and Order

The Board concluded that the contracts between the Company and the Union, together with the practices of the parties regarding the selection and authority of master mechanics and the discriminatory provisions of the Union's constitution, constituted an unlawful hiring arrangement which conditioned employment with the Company on good standing membership in respondent Union. The Board found, therefore, that the maintenance and enforcement of this arrangement was violative of Section 8(b)(2) and (1)(A) of the Act. The Board also found that the Union violated these provisions of the Act by causing the Company to fail to promote Rittenberry to master mechanic, and by refusing to permit Rittenberry's return to his job following the strike. In addition, the Board found that the Union violated Section 8(b)(1)(A) by threatening Rittenberry with loss of employment if he did not withdraw his unfair labor practice charges (R. 138-145).

The Board's order requires respondents to cease and desist from the unfair labor practices found, and from in any manner interfering with the employees in the exercise of their Section 7 rights. Affirmatively, respondent Local 450 is required to reimburse all Tellepsen employees for any dues or assessments unlawfully exacted from them pursuant to the illegal hiring arrangement, and to make Rittenberry whole for any loss of earnings he may have suffered as a result of

the discrimination against him following the strike. Finally, respondent Union is directed to post appropriate notices (R. 149-151).

C. The Decision of the Court of Appeals

The Court of Appeals sustained the Board's unfair labor practice findings, and granted enforcement of its order, except that portion requiring reimbursement of the monies paid to the Union. Following its prior decisions in *National Labor Relations Board* v. *Local 85, Sheet Metal Workers' International Association,* 274 F. 2d 344, and *National Labor Relations Board* v. *Millwrights' Local 2232,* 277 F. 2d 217, the court held that the order of reimbursement could not be enforced because there was no proof that "dues and assessments would not have been paid except as a requirement for obtaining employment" (Appendix, p. 9a, *infra.*).

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that monies paid by the employees to the union while subjected to those practices be repaid to them. The same question is presented in *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board,* and *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters,* Nos. 68 and 85, this Term, certiorari granted June 27, 1960. In addition, Board petitions for certiorari are pending in other cases involving the question including *Local 85, Sheet Metal Workers,* No. 89, this Term, and *Millwrights' Local 2232,* No. 229, this Term, relied on by the court below. The instant petition is filed to preserve the Board's position on the issue in this case.

CONCLUSION

For these reasons, the present petition should be granted, or, in the alternative, held in abeyance pending a decision on the question in Nos. 68 and 85.

Respectfully submitted.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

RUSSELL SPECTER,
Attorney,
National Labor Relations Board.

I authorize the filing of this petition for a writ of certiorari.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1960.